IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19/06/2003

Coram

The Honourable Mr. Justice P. SHANMUGAM
and
The Honourable Mrs. Justice R. BANUMATHI

Appeal Suit No.367 of 1985

N. Ganesan .. Appellant

-Vs-

1. Nagarathnam (died)
2. Saravanamurthi
3. Manikavachagam (died)
4. Smt. Sethulakshmi
5. Smt. Vathsala Manickavasagam
6. M. Sivanantham
7. M. Nithyanandham .. Respondents

(R-2 to R-4 recorded as L.Rs.
of deceased R-1 as per Order
dt.19.7.1990 in USR 6518/90)

(R-5 to R-7 recorded as L.Rs.
of deceased R-3 as per Order
dt.19.6.2003 passed in C.M.P.
No.5066 of 2003 by PSMJ & RBIJ)

PRAYER : Appeal against the Decree and Order dated 13.2.1984 passed in O.S. No.96 of 1981 on the file of the Subordinate Judge, Thanjavur.

!For Appellants : Mr. S.V. Jayaraman,
Senior Counsel for
M/s. S. Ramu & Chandramohan.

^For Respondents : Mr. V.K. Vijayaraghavan
(for the L.Rs. Of R-3)

No appearance for other respdts.

:J U D G M E N T

DELIVERED BY

P. SHANMUGAM, J.

The first defendant is the appellant. The suit was for partition and declaration of their 4/5th share in the suit properties. The suit was decreed and the appeal is against the said judgment and decree.

2. The plaintiffs are the mother, sons and daughters of one Nithyanandham. The first defendant is the eldest son of Nithyanandham. The father Nithyanandham died on 22.9.1956. The suit properties comprise of three items consisting of a vacant site of about 10,000 sq.ft. covered under Item No.1, a house site situated at Thanjavur covered under Item No.2 and a house at Uraiyur, Tiruchirappalli District covered under Item No.3. All these suit properties stand in the name of the first defendant. The case of the plaintiffs is that Nithyanandham was in service as Joint Registrar of Co-operative Societies and with the funds provided by Nithyanandham, the first item of the suit property was purchased in the name of the first defendant on 22.3.1955 under Exhibit A.1. The second item of the suit property was acquired under Exhibit B.8 dated 21.10.1964 by utilizing the family funds. The third item of the suit property, a house at Tiruchy was purchased again in the name of the first defendant under Exhibit A.4 dated 3.10 .1957 by utilizing the retirement benefits of late Nithyanandham.

3. The further case of the plaintiffs is that the suit properties are family properties intended for the benefit of the family. According to them, the vacant plot at Thanjavur was purchased by Nithyanandham when the first defendant was a student and while Nithyanandham was working as the Joint Registrar of Co-operative Societies and therefore, he could not buy the same in his name. It is pleaded that the first defendant could not have paid any money towards the said purchased as he was living as a dependent of the family and therefore, the plot was treated as the family property of the plaintiffs and the first defendant after the death of Nithyanandham. Similarly, item no.3 is a house property at Tiruchy Town which was purchased after the death of Nithyanandham on 3.9.1957 from out of the funds due to Nithyanandham towards Insurance, Provident Fund, Gratuity, etc. The recitals of the purchase deeds show that the property was purchased by the first defendant as 'bghJ FLk;;gj; jiyth;' (Joint Family Head). The second item of the suit property was purchased by the first defendant from the retirement benefits of late Nithyanandham.

4. The plaintiffs also pleaded that the first defendant has executed a release deed, Ex.A.3 dated 11.11.1959 in order to avoid the Land Ceiling Act and it was done on the advice of the first defendant and hence, the release deed came to be executed. They further pleaded that the first defendant has disposed of the landed properties obtained by him after getting the release and that he is also trying to sell the other properties purchased by him and hence the above suit for partition.

5. The first defendant contested the claim for partition. According to him, the first item of the suit property had never been a family property much less an ancestral joint family property. The property was obtained by allotment from a Co-operative House Building Scheme and late Nithyanandham, out of love and affection towards the first defendant, gave it to him absolutely to be owned and enjoyed by him and ever since the allotment

and transfer, he had been in absolute possession and exclusive enjoyment by paying tax, etc. He has also made improvements on the property. According to him, the second item of the suit property is a self-acquired property purchased from his income and the funds raised out of the sale of the jewels belonging to his wife and also out of the money paid by his father-in-law. He denied the allegation that funds were sent and provided by the family members and that he had no independent income to purchase the property. The first defendant has conceded that the third item of the suit property is the property of the family and that it has to be divided among the heirs of late Nithyanandham. He has also pleaded that he was given non-fertile lands in the release deed and that there was a subsequent partition among the plaintiffs in the year 1973. The first plaintiff, therefore, pleaded that the suit for partition was not maintainable and was liable to be dismissed.

6. The learned Subordinate, after considering the matter, found that items 1 to 3 of the suit properties are joint family properties and that late Nithyanandham did not own the first schedule of property and that the first defendant did not purchase the second item of the suit property by utilizing the funds provided by his father-inlaw and sale of the jewels of the wife. The learned judge also found that the suit is not barred by limitation and accordingly decreed the suit as prayed for. The appeal is against this judgment and decree.

7. According to the learned senior counsel Mr. S.V. Jayaraman arguing on behalf of the appellant, there is no joint family in order to seek for a partition as though the properties belonged to the joint family and in any event, subsequent to the release in the year 1959 under Ex.A.3, there is division in status and the suit properties were not treated as the family properties at any point of time either at the time of the release deed in the year 1959 or in the subsequent partition entered into between the plaintiffs in the year 1973. Learned senior counsel submitted that Item No.1 of the suit property was purchased in the name of the first defendant from the funds provided by his father out of his love and affection towards him. As far as Item No.2 is concerned, according to him, they were purchased from out of the funds provided by his father-in-law after his marriage. Insofar as the third item of the suit property is concerned, the learned senior counsel is willing to concede that the same can be divided among the heirs of Nithyanandham excluding the first defendant. Learned senior counsel submits that the court below has seriously erred in finding the existence of a joint family without a nucleus and overlooking the fact that Nithyanandham was earning from his service as the Joint Registrar and only from out of his own income, provided funds to the first defendant to purchase the property. He further submits that the retirement benefits of Nithyanandham were utilized only for the family expenses and not for buying Item No.2 of the suit property. Therefore, the learned senior counsel seeks to set aside the decree or to modify the deed excepting Item No.3 of the suit property.

8. Learned counsel appearing on behalf of the respondents, plaintiffs in the suit, strenuously pleaded that the first defendant, having been a college student at the relevant time of the purchase of the property, had no funds of his own to acquire the property and he being the eldest member

of the family, the property was purchased in his name for the benefit of the family and therefore, it should be made available to the family. Insofar as the second item of the suit property is concerned, by referring to the various exhibits, he submitted that funds were given to the first defendant to enable him to buy the second item of the suit property and therefore, the said property also is available for partition. In reference to the release and the partition, the submission of the learned counsel is that they were pertained only to the landed properties and not the house sites which are the suit properties. According to him, those properties were kept intact to be partitioned at a later point of time. He further submits that the learned trial judge has given elaborate reasons for justifying the decree and submits that the said judgment does not call for any interference.

9. We have heard the learned senior counsel for the appellant and the learned counsel for the respondents and considered the matter carefully.

10. It is not in dispute that there was a partition in the year 1973 in reference to the landed properties and earlier, a release deed in the year 1959 in reference to the landed properties which were approximately to a total extent of 40 acres of land. It is not convincingly explained as to why the house properties, which are the subject matter of the present suit, were not included if they really were joint family properties. The learned Subordinate Judge failed to consider whether there was a joint family in existence consisting of late Nithyanandham and his sons and whether the property was purchased in the name of one of the sons for the benefit of the joint family. The reason advanced by the plaintiffs is that the purchase was banami in order to avoid the Government Servants' Conduct Rules. The said argument is not sustainable. It is an admitted fact that all the suit properties as well as the landed properties were acquired only by late Nithyanandham. There was no ancestral nucleus and income. The landed properties were purchased in the name of Nithyanandham, whereas the first item of the suit property was obtained in the name of the first defendant, of course from the funds provided by his father. There is no no reason as to why he should provide funds to the first defendant when he could have purchased it in the name of his wife or the other children. Besides, there is absolutely no explanation as to why even the after the death of Nithyanandham, the property continued to be enjoyed by the first defendant and was treated as his property, as evidenced by the release deed of the year 1959 and the partition deed of the year 1973. The acceptance of the right of the first defendant for nearly 20 years speaks loudly against the present claim of the plaintiffs that the property was purchased benami in the name of the first defendant.

11. As rightly pointed out, there is no nucleus for the joint family consisting of Nithyanandham and his sons so as to claim that the properties purchased in the name of first defendant should be made available for the joint family. The facts that the suit properties were not included in the year 1959 when the release deeds were obtained from the first defendant and when partition was executed in the year 19 73 which the first defendant has attested, all goes to show that the first item of the suit property was purchased, kept and treated as the properties of the first defendant. As pointed out, it is the specific case of the first defendant that though he was

a college student, he had purchased the property from the funds provided by Nithyanandham. In the absence of any joint family, it has to be taken that the first defendant has purchased the property in his name from the funds provided by his father and hence, the same cannot be treated as joint family property in order to make it available for partition.

12. The second item of the suit property is covered by Ex.B.8 dated 21.10.1964 which was purchased for a total consideration of Rs.18,200 /-. The first defendant got married on 12.2.1959. According to him, he had been provided with a fund of Rs.10,000/- as gift by his father-in-law when he went to his house for the first time for the Aadi function and states that it is an usual custom to provide such gifts to the son-in-law. It is in evidence that the sum of Rs.10,000/- was put in a fixed deposit as per Ex.B.2 and when it matured after two years on 3.10.1964, by Ex.B.8 dated 21.10.1964, the second item of the suit property was purchased. It is further evidence that the maturity value of Rs.10,000/- was Rs.14,985/- and the remaining amount of Rs.3,315.15 was provided by his father-in-law. According to him, Ex.B.9, letter given by the vendor of the second item and the further documents evidencing the payment of the remaining instalments namely Exs.B.10, B.12, B.16 as also the sale deed executed by the Society by Ex.B.11 show that the second item of the suit property was acquired by the first defendant in his individual capacity.

13. The second defendant had also examined P.W.3, his father-in-law who had confirmed the above evidence. The father□in-law was a Contractor besides having functioned as the Chairman of the Thanjavur Municipality, President of the Thanjavur Co-operative Society for nearly 1 4 years, President of the Thanjavur Land Development Bank for nearly 12 years and further, he had also functioned as the Vice President of the Thanjavur Permanent Bank and Director of the Thanjavur District Co-operative Bank for nearly seven to eight years. He had stated in his evidence that he had willingly agreed to provide a house to his son-in-law and accordingly gave Rs.10,000/- for being deposited in fixed deposit besides providing further funds for the purchase of the property.

14. The oral evidence of P.W.1, the Senior Assistant of the F.D.F. Section of the Tiruchy Central Co-operative Bank reveals the deposit of Rs.10,000/- in the name of the first defendant, as evidenced by Exs.B.2 and B.3. The initial deposit made in the year 1959 was renewed for two years and the said amount matured on 23.9.1961 and it was further renewed for another three years and then, it matured on 31.10 .1964.

15. P.W.3, the father-in-law of the first defendant has clearly stated that he had agreed to provide a house to his daughter and for that purpose, when his son-in-law came to his house for the Aadi function, he gave him Rs.10,000/- as gift, which was deposited in a fixed deposit. He has also stated that he had helped the first defendant to purchase Item No.2 of the suit property and during that time, the first defendant was functioning as a lawyer, that the second item of the suit property was under his accommodation and control and that the family of the plaintiffs did not provide any money for the purchase of this property. P.W.3 has withstood the cross-examination

and has reiterated the provision made by him for the purchase of the property to the first defendant. There is no reason as to why the evidence of P.Ws.1, 2 and 3 in reference to the purchase of this property should be rejected. On the contrary, the evidence provided by the plaintiffs in this regard is vague and lacking in clarity.

16. The case of P.W.1 is that when her husband died, they were at Madras and after his demise, they shifted their residence to Tiruchy. According to them, the account standing in the name of the first defendant in the year 1957 was transferred to the Tiruchy Branch, as evidenced by Ex.A.25. Apart from this transfer of the Savings Bank Account, the counsel for the plaintiff is not in a position to prove the evidence in reference to the use of the Gratuity and other retirement benefits of late Nithyanandham and as to how those funds were dealt with. The transfer amount in the year 1957 of Rs.10,000/- is not corelated with the alleged Gratuity and other retirement benefits. The plaintiff wants to infer that it is this amount of Rs.10,000/- that was deposited in the year 1959. There is absolutely no evidence to show that the funds were utilized from the Savings Bank Account for the purchase of the second item of the suit property. On the other hand, the first defendant himself concedes that the third item of the suit property was purchased on 3.9.1957 by utilizing the Gratuity, Insurance amounts of late Nithyanandham and the sale of the car, etc. The timing of the death of Nithyanandham, the transfer of the funds and the purchase of the third item of the suit property and the recitals in the deed would clearly show that the third item was purchased for and on behalf of the family as the elder member of the family. The first defendant is prepared to concede that this property could be made available for partition. The contrary finding of the learned Subordinate Judge in reference to the second item of the suit property cannot be sustained and it is erroneous. Learned counsel for the respondents is not in a position to correlate his submissions with any documentary evidence to establish that funds were sent from Madras to Tiruchy and that the same were made available for the purchase of the property covered under Ex.A.2. After going through these exhibits, we find that there is no correlation or any connecting link to prove that the retirement benefits were deposited in the bank at Madras and that the same were transferred for the purchase of this property.

17. From the above, it is clear that the submission of the learned counsel for the respondents cannot be accepted in the absence of a clear proof to show that that the retirement benefits of the father were utilized for the purchase of the second item of the suit property. Coupled with this factual position namely that the partition and the division that had taken place in the family of the plaintiffs and the first defendant excluding the suit properties, the fact that the properties standing in the name of the first defendant is purchased and enjoyed by the first defendant as his own property cannot be in dispute.

18. Learned senior counsel for the appellant himself has conceded the position in reference to the third item of the suit property. As a matter of fact, in the written statement itself, in paragraph 10, the first defendant has stated that the third item of the suit property is the property of the family and that it has to be divided among the heirs of Nithyanandham.

19. In the above circumstances, we are of the view that the judgment of the learned Sub Judge cannot be sustained and needs to be set aside to the extent of the decree in reference to Item Nos.1 and 2. The decree for partition is confirmed only to the extent of Item No.3 and there will be a preliminary decree for partition in reference to the third item of the suit property. As stated above, the learned senior counsel for the appellant has submitted that the appellant is not interested in claiming any right in reference to the third item of the suit property even though he had claimed a share in the same in his written statement and is willing to give up his right in reference to the third item. Accordingly, while setting aside the decree in reference to Item Nos.1 and 2, we are of the view that insofar as Item No.3 of the suit property is concerned, the shares other than the appellant are entitled to be divided equally. The appeal is allowed to that extent.. There will be no order as to costs.

C.M.P. No.5066 of 2003 is ordered.

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Index : Yes
Website : Yes

To

1. The Subordinate Judge,
Thanjavur (With Records, if any).

2. The Record Keeper,
V.R. Section,
High Court,
Chennai.